United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

74-2662

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To be argued by
ALBERT A. CAPELLINI

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DOCKET NO. 74-2662

UNITED STATES OF AMERICA,

Appellant,

-v.-

LOUIS ZAICEK,

Defendant-Appellee.

On Appeal from the United States District Court
For the Southern District of New York

BRIEF FOR LOUIS ZAICEK

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On the Brief

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BRIEF FOR THE APPELLEE LOUIS ZAICEK

PRELIMINARY STATEMENT

The United States appeals from an order filed on November 18, 1974, by the Honorable Charles M. Metzner, United States District Judge, in the United States District Court for the Southern District of New York, granting, after an evidentiary hearing, the motion of Louis Zaicek, the appellee herein, and suppressing as evidence the contents of an attache case removed from the locked trunk of Zaicek's rented automobile. The Government also appeals from an order of Judge Metzner, filed on December 10, 1974, denying its application for a rehearing on the suppression proceedings.

FACTS AND BACKGROUND

More than two years ago on December 27, 1972, a New York

State Trooper, George Johansen, had information indicating that the appellee, hereinafter referred to as Zaicek, had failed to meet one payment of his lease agreement with a Florida-based car rental outfit and had earlier in the month presented improper documents to Vermont Motor Vehicle officials purportedly conveying title of the same rented car to himself. On that late day in December, the trooper, assigned to automobile theft investigations, and a brother officer, had Zaicek's leased automobile under surveillance as it remained parked in a private driveway in the Westchester County hamlet of Valhalla. After some period of time Zaicek and a companion, one Baddia, emerged from a nearby home and both men, Zaicek on the driver's side, entered the car. Before the vehicle could exit into the public street, Johansen drove his car behind it blocking any further movement. At the insistence of Zaicek, the police, Zaicek and his companion went into Baddia's home where the trooper called the out-of-state rental concern. After learning that the disputed payment was still outstanding - a Zaicek check having "bounced" for insufficient funds - and at the request of the rental agent who had been apprised of the Vermont occurrence, Johansen, while still in the house, arrested Zaicek for mere possession of a stolen automobile (14-17, 21-29).*

Zaicek turned over the keys to the trooper and the other officer drove Zaicek's car to the Police Barracks at Hawthorne, New

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*All references unless otherwise indicated are to appellant's Appendix.

York, where the car was locked and secured. At the Barracks, Zaicek's companion, realizing that the arrest procedures would take some time, decided to leave and asked Johansen if he could remove his clothing from the vehicle. Johansen gave the keys to two officers who accompanied Baddia to the car ostensibly to retrieve the clothing (29-30, 32-33).

The particularities as to what occurred to the car outside the Barracks are unknown due to the trial assistant's failure to produce any witnesses on that subject despite the fact that Judge Metzner not once but twice during Johansen's testimony at the hearing urged the prosecutor to produce at least one of the two needed officers. In any event it was clear from Johansen's in-court statements that while the two officers had been sent not to inventory the car but to obtain the clothing of Baddia who went with them, they in fact returned with a pistol, taken from the glove compartment, and an attache case, containing allegedly stolen bonds, removed from the locked trunk of the car in question (39-46).

As a result of these seizures Zaicek was also arrested for possession of a firearm and allegedly stolen negotiable securities. Zaicek was never arrested or subsequently indicted by any jurisdiction for the alleged actual or attempted theft of the rented automobile in spite of the fact that the vehicle was leased to him and in his custody up until the time of the arrest.

On January 10, 1973, some two weeks after Zaicek's arrest,

a preliminary hearing was held before the Honorable Henry J. Logan, a Justice of the Town of Mount Pleasant in Westchester County. At the conclusion of the evidence, the judge, with the consent of the People, dismissed that part of the information charging possession of the stolen vehicle and the securities. Thereafter Zaicek was indicted by the Grand Jury of Westchester County solely for the crime of possession of a loaded weapon.*

Federal law enforcement authorities became involved in the case against Zaicek just a few days after his arrest --December 27, 1972-- on New York State charges (8-9). Despite that fact, Zaicek was not originally charged by federal authorities with any crime relative to the possession of the rented car until November 6, 1974, one week before the suppression hearing herein, when an indictment was filed superseding an information which had only accused Zaicek of possession of stolen securities. The indictment, incorporating the two securities counts of the information, now charged Zaicek with transporting a stolen car across state lines. The filing of the indictment at that late stage of an already protracted case caused a further postponement of the trial itself and evoked Judge Metzner's castigation of the Government's handling of the entire case against Zaicek (6-12). After pleading not guilty to the new accusatory instrument, Zaicek was continued on his own recognizance with per-

*While the aforesaid occurrences in the State of New York are not a specific part of the record on appeal, we have included the pertinent information, a matter of public record, so as to provide this reviewing tribunal with a more comprehensive background of the facts underlying this case.

mission granted to him to journey to and from Florida where he was employed (12-13).

The evidentiary hearing that followed consisted solely of the testimony of Johansen and one Martin Upmal, a Vermont official, the prosecutor failing, in the face of judicial advisement to the contrary, to call either of the two officers who actually performed the search. On November 18, 1974, Judge Metzner suppressed the tangible evidence and, in an opinion, carefully drawn to refute each of the prosecutor's verbal and written arguments, found that the search was neither incidental to the arrest nor an inventory but rather a general exploratory search for incriminatory evidence - "a fishing expedition" (75-80).

Thereafter, the prosecutor belatedly moved to reargue the suppression motion representing to the Court for the first time that he had previously been unable to locate one of the State policemen who had searched Zaicek's car, a circumstance which he claimed no longer existed. He therefore prayed that the Court permit him to produce the officer who would testify that he came upon the securities when Zaicek's companion told him he had an attache case in the car and the officer opened the case believing it was Baddia's (92-83).

Zaicek's trial counsel answered noting inter alia that the proposed evidence could hardly be deemed "newly discovered". On December 10, 1974 the Court denied the motion for reargument

in a memorandum opinion (84-85).

On this appeal the Government maintains that Judge Metzner erred in suppressing the contents of the attache case. More specifically, it argues that the alleged lawful seizure of Zaicek's rented car imparted the police with the right "to search it without a warrant or probable cause as to its contents and without a showing of 'exigent circumstances' even if, as Judge Metzner found, the search was for evidence of a crime" (see Appellant's brief, p. 7). Moreover, the Government again seeks to justify the search as an inventory and, in the alternative, reasons that the suppressed items would inevitably have been discovered by a proper inventory of the car's contents (Id. 9-15). Lastly, on the question of the search, it is argued that the arresting officer had probable cause to search the contents of the car for evidence of a crime and it was not necessary for the search to have occurred at the scene of the arrest. A final issue is raised with respect to the denial of the motion for reargument wherein the Government essentially rehashes the position of the prosecutor below. For the reasons that will follow momentarily, the arguments of the Government should be rejected.

THE EVIDENCE

George Johansen, Chief Investigator with the Car Theft Investigation Unit at the Hawthorne Barracks of the New York State

Police, testified that in the month of December*, 1972 he received a call from Martin Upmal of the Department of Motor Vehicles in the State of Vermont (13-15, 34). Upmal advised the investigator that a New York resident identified as Louis Zaicek had appeared at the Vermont Motor Vehicle Office with a bill of sale, motor vehicle application and rental agreement, and attempted to register a 1972 Cadillac Eldorado bearing vin number 6L67S2Q435634 and a Florida plate number 10E7052 (15-16, 19-20, 36). Upmal further reported to Johansen that Zaicek left the office when "challenged" leaving behind the paperwork (15).

Some time thereafter in the month of December, Johansen communicated by teletype with officials of the Motor Vehicle Department in Florida. By return teletype message the trooper learned that the aforesaid Cadillac Eldorado was owned ny Mainline Fleets of Pompano Beach, Florida (16-21).

On December 27, 1972, George Johansen and a fellow officer kept Zaicek's rented automobile under surveillance as the vehicle remained parked in a private driveway off Roosevelt Drive in the Hamlet of Valhalla, Westchester County, New York. Thereafter Zaicek and another individual Armenio Baddia emerged from Baddia's house and both entered the automobile, Zaicek taking the wheel. As the car backed out of the driveway Johansen drove his car behind Zaicek's impeding any further exit from the driveway (21-22). The troopers

*While the entire sense of Johansen's testimony indicated that he received the call in December, the record on page 14 of the Appendix reflects the month of September.

alighted from their vehicle and identified themselves. Upon Johansen's request Zaicek produced a registration (Exh. 3), two Florida Driver's licenses (Exh. 4 and 5), and a rental agreement between Mainline Fleets of Pompano Beach and LCZ Construction Company signed by Louis Zaicek (Exh. 2), all of which documents pertained to the Cadillac in question (21-25, 27).

Johansen advised Zaicek that the vehicle had been reported "overdue" from Mainline Fleets in Pompano and that Johansen's investigation had shown "a payment on the lease was voided, a check was written with insufficient funds". *Zaicek, aware of the problem, told the investigator that he "had taken care of the matter and had mailed payment to Mainline". Zaicek also asked Johansen to accompany him to the house nearby where Mainline could be telephoned and the problem resolved. The investigator who had not arrested Zaicek agreed to make the call. Inside Baddia's house Johansen reportedly spoke by telephone to an official of the car rental outfit. The official, claimed to be one Richard Ronan, told the investigator he wished to recover the Cadillac since a Zaicek check had "bounced" and a report had been received that Zaicek had attempted to register the car in Vermont. Ronan also requested the trooper to arrest Zaicek. Johansen then did as requested, arresting Zaicek for "possession of stolen property" (27-29).

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*The Government in its "Statement of Facts" (Brief, pp. 2-3) indicates on two occasions that Johansen had received information that the Cadillac was "stolen". The facts do not justify that characterization.

Zaicek and Baddia, the latter not arrested, were driven by Johansen to the Hawthorne Barracks. Meanwhile, Zaicek's rented vehicle was driven by the other trooper to the Barracks. At the headquarters, the Cadillac was locked and the keys given to Johansen. Baddia, Zaicek and Johansen then went inside the office where Baddia learned that Zaicek would be kept there and processed. Deciding to leave, Baddia asked if he could remove his clothing from the car. Johansen gave the keys to two police officers and directed them to accompany Baddia to the vehicle and return Baddia's property. For that purpose Baddia and the two officers went outside. A short while later both officers came back to Johansen. One had a revolver which they had found in the glove compartment and the other had an attache case containing a brown paper bag housing a quantity of municipal bonds and stocks, the case having been removed by the officers from the locked trunk. After Zaicek was arrested and processed for the possession of these items, Johansen personally inventoried the contents of the Cadillac (Johansen testified that whenever a stolen vehicle was taken to the Barracks normal procedure dictated that all articles inside the car would be inventoried) (30-34, 39-40, 45, 47).*

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*Johansen frankly admitted that he had ordered the two officers to escort Baddia to the car solely for the purpose of removing Baddia's clothing. The search, according to Johansen, was not incident to the arrest. Yet, Johansen's police report, Exh. 1, clearly stated that the search of the car was conducted as an "incident to arrest"(36-41). Johansen also denied that Zaicek had told him the revolver was registered in Florida and Johansen could not recall whether Baddia had indicated that his clothing was in a certain location in the car.

The only other witness for the prosecution, Martin Upmal, the Director of Title and Anti-Theft for the Vermont Department of Motor Vehicles, testified that in December of 1972, he met Louis Zaicek at the "tax window" of his bureau. Zaicek had filled out an application for registration (Exh. 7) and a tax form (Exh. 6) for a 1971 Cadillac bearing a vin number which Upmal knew was for a 1972 Cadillac (The vin number matched the number of Zaicek's leased Cadillac). Upmal told Zaicek that there was a discrepancy between the vin number and the model year he was claiming for the car. Upmal explained that he would need further documentation in order to register a 1972 vehicle, such as a statement of origin if the car came from a non-title jurisdiction. Zaicek indicated to Upmal that he would be willing to obtain the needed documents and left the office leaving behind the application and tax forms (Exh. 6 and 7). Zaicek had also shown Upmal a handwritten bill of sale for the vehicle (50-55, 57-59).

Upmal then called the Cadillac Motor Division in Boston and was able to learn from Cadillac that the car in question had been sold by a dealer to the Mainline Fleet Leasing Company believed to be in Florida. Upmal did not call Mainline nor did he call George Johansen of the New York State Police but the matter was referred to the Federal Bureau. Some time before Christmas of 1972, George Johansen called Upmal and the Vermont official detailed the events just described (55-59).

ARGUMENT

POINT ONE

THE ORDER OF SUPPRESSION WAS PROPER AND SHOULD NOT BE DISTURBED (Answering Appellant's brief, Points I and II, pp. 6-17).

We deal here with the several contentions advanced by the Government to support its appeal for a reversal of Judge Metzner's order below. Each of those plaints will be specifically treated under a sub-heading of this point. Preliminarily to that discussion, however, we pray the Court's indulgence to permit us to briefly survey the controlling or persuasive legal precedents of the subject matter herein.

A. THE LEGAL FRAMEWORK

We start with the proposition universally and uniformly recognized by the Supreme Court of the United States, that "... searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment - subject only to a few specifically established and well-delineated exceptions" [Katz v. United States, 389 U.S. 347, at 357 (1967); see, also, Cady v. Dombrowski, 413 U.S. 433 (1973); Coolidge v. New Hampshire, 403 U.S. 443 (1971); Chambers v. Maroney, 399 U.S. 42 (1970); Dyke v. Taylor Implement Mfg. Co., 391 U.S. 216 (1968); Harris v. United States, 390 U.S. 234 (1968); Cooper v. California, 386 U.S. 58 (1967); Warren v. Hayden, 387 U.S. 294 (1967); Preston v. United States, 376 U.S. 364 (1964); Mapp v.

Ohio, 367 U.S. 643 (1961); Carroll v. United States, 267 U.S. 132 (1925); Weeks v . United States, 232 U.S. 383 (1914)].

For present purposes the exceptions to the warrant mandate are broadly defined in the following categories: (1) search of a vehicle incident to a lawful arrest [Preston v. United States, supra; Weeks v. United States, supra]; (2) a vehicular search based upon probable cause to search the vehicle itself when exigent circumstances make it impractical and unnecessary to obtain a warrant [Chambers v. Maroney, supra; Carroll v. United States, supra]; and (3) searches of vehicles designed to achieve a legitimate administrative or protective end totally unconnected with the quest for incriminatory evidence [Cady v. Dombrowski, supra; Harris v. United States, supra] and search of a vehicle held in the unquestioned lawful custody of the police for forfeiture proceedings [Cooper v. California, supra]. To each of these warrant exceptions we now turn.

(1) A search may be justified as incident to an arrest when the automobile is within the control or possession of the arrestee giving him access to potential weapons or evidence therein [Coolidge v. New Hampshire, supra at 457; see, also Chimel v. California, 395 U.S. 752 (1969)]. But under no circumstances, the authorities agree, will a search of a car be considered incident to an arrest where "...[it] is remote in time or place from the arrest. Once an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not

incident to the arrest" [Preston v. United States, supra at 444; see, Coolidge v. New Hampshire, supra at 457; Chambers v. Maroney, supra at 47; Dyke v. Taylor Implement Mfg. Co., supra.]*

(2) Whenever reasonable or probable cause exists for an officer of the law to believe that an automobile contains contraband, a warrantless search will be condoned as long as the vehicle's mobility presents a practical exigency for an immediate search of its contents: "The right to search and the validity of the seizure are not dependent on the right to arrest. They are dependent on the reasonable cause the seizing officer has for belief that the contents of the automobile offend against the laws" [Carroll v. United States, supra at 158-159 quoted in Chambers v. Maroney, supra at 48]. While Carroll and its progeny were originally confined to cover seizures of contraband items reasonably believed to be transported or contained in vehicles, the Supreme Court in Chambers seemingly expanded the schedule of seizable articles to include mere evidence [Id., see Harlan's dissent, footnote 7, pp. 62-63].

Moreover, the Chambers majority found no constitutional difference between a search founded on probable cause at the time a vehicle is stopped on a highway and a search of that same vehicle which occurs later at another location. The same probable cause, the Court argued, exists in both situations "...and so [does] the

*The Government submitted three different briefs at various times to Judge Metzner concerning its legal posture with respect to the search. Though it advocated there that the search was approbatable as one "incident to an arrest" that position has been abandoned on this appeal.

mobility of the car unless the Fourth Amendment permits a warrantless seizure of the car and the denial of its use to anyone until a warrant is secured" [Id. at p. 52; see, also, United States v. Capra, 501 F 2d 267 (2d. Cir 1974)]. Thus, the Supreme Court has enlarged the Carroll-enunciated exigent circumstance rule to give new meaning to the word "mobility", one which recognizes the practical difficulties --poor lighting for example-- police may encounter in conducting an otherwise authorized search of a stopped vehicle on a highway. The fiction that the car's mobility is not impaired despite police control and custody of the vehicle is maintained solely, we suggest, to justify the invocation of the Carroll exception.

Chambers is also noteworthy for what the Court had to say on the question of the warrant requirement:

> Neither Carroll, supra, nor other cases in this Court require or suggest that in every conceivable circumstance the search of an auto even with probable cause may be made without the extra protection for privacy that a warrant affords. But the circumstances that furnish probable cause to search a particular auto for particular articles are most often unforseeable; moreover, the opportunity to search is fleeting since a car is movable [id at pp. 50-51].

In sum, Chambers ratifies the well-established rule that warrantless searches of vehicles will not be countenanced unless the circumstances justifying the intrusion were not foreseeable by the police [see, Coolidge v. New Hampshire, supra at p. 460].

(3) Searches of vehicles solely designed to achieve an administrative or protective goal are apparently becoming more

acceptable to the Supreme Court where the reasonableness of the intrusion is measured by the extent of the custodial obligation of the police and the non-incriminatory purpose of the search [Cady v. Dombrowski, supra at 236; Cooper v. California, supra]. However, the Supreme Court has given advance warning that "'lawful custody of an automobile does not of itself dispense with constitutional requirements of searches thereafter made of it'...the reason for and nature of the custody may constitutionally justify the search" [Cooper v. California, supra at 61; see, United States v. Lawson, 487 F. 2d 468 (8th Cir. 1973)].

Thus, in Cooper, a case involving an impounded car held for a week by the police for forfeiture proceedings, the Court found search reasonable if only "for their [police] own protection", inasmuch as the police were statutorily required to maintain the car in their custody for over four months [Id. at pp. 61-62]. Nonetheless, the Court since Cooper has taken pains to prevent any undue extension of the Cooper rationale beyond the facts uniquely present therein:

> "In Cooper, the seizure of the petitioner's car was mandated by California statute, and its legality was not questioned. The case stands for the proposition that, given an unquestionably legal seizure, there are special circumstances that may validate a subsequent warrantless search. Cf Chambers, supra. The case certainly should not be read as holding that the police can do without a warrant at the police station what they are forbidden to do without a warrant at the place of seizure [Coolidge v. New Hampshire, supra footnote 21, p. 464]."

While arguably cases like Cady, Harris* and Cooper support the reasonableness of various police housekeeping procedures including perhaps the so-called inventory search, there is division in the jurisdictions as to the permissible scope of these non-inculpatory searches [Compare, Mozzetti v. Superior Court, 4 Cal. 3d. 699 (1971) with People v. Sullivan, 29 N.Y.2d 69 (1971); see, generally, XL Ford. Law Rev. Marc. '72, pp. 679-687; 48 ALR 3d 537-587].** In any event it is beyond cavil that the non-incriminatory intendment of these latter-type intrusions commends their judicial approbation as perhaps reasonable police activities. Or put another way, a search for inculpatory evidence should never be condoned under the rubric of an inventory [Cady v. Dombrowski, supra at pp. 443, 447; Dyke v. Taylor Implement Mfg. Co., supra at 221; United States v. Capra, supra at 280; Pigford v. United States, 273 A 2d 837 (D.C. 1971)].***

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*The decision in Harris v. United States, supra, specifically excluded any consideration of police departmental regulations concerning inventory procedures [Id. at 236].

**It should be noted that both Cady and Harris dealt with the seizure of items that were "in plain view" during the course of the police's non-criminal contact with cars [Cady v. Dombrowski, supra at 442; Harris v. United States, supra at 236].

***In Capra this Court observed:

"The Government contended at the hearing that this was a routine inventory search for the protection of the defendant's property, but the trial Court properly rejected that argument because, even though the police may have 'exercised a form of custody or control' over the car, they clearly conducted the search for the purpose of securing incriminating evidence" [501 F. 2d at 280].

B. A VEHICULAR SEARCH FOR INCULPATORY EVIDENCE IS NOT JUSTIFIED SOLELY ON THE BASIS OF A VALID SEIZURE BY THE POLICE [Answering Appellant's brief, Point I, A and B, pp. 6-15].

At the outset, we note that Judge Metzner found probable cause for Zaicek's arrest for possession of a stolen automobile. We are yet to be persuaded to concur in the correctness of that finding, since it is clear the dispute between Zaicek and the rental firm over one dishonored payment was more a civil matter than anything else. In that vein it should be recalled that Trooper Johansen never testified that the car was reported stolen and the record is silent as to any outstanding out-of-state warrant from any jurisdiction. Indeed, it appears somewhat incongruous that Zaicek, the sole custodian of the Cadillac under a valid agreement for the rental thereof, was arrested for possessing a stolen automobile and not for the alleged theft. Obviously, what occurred in Vermont alarmed the rental car official to the point that he became anxious for the return of the car and for that end requested Zaicek's arrest. But did the totality of the circumstances warrant the trooper to believe that the car was stolen? Under the circumstances of this case, we suggest no such belief was permissible and the subsequent search was thereby tainted by the illegal arrest [Mapp v. Ohio, supra; Silverthorne Lumber Co. v. United States, 251 U.S. 385(1920)].

Assuming arguendo that probable cause existed for the relevant arrest, the major plaint of the Government rests on the

broad position, already rejected by the Supreme Court [see, Cooper v. California, supra at 61], that a valid seizure of a vehicle justifies a search of it "without a warrant or probable cause as to its contents and without a showing of 'exigent circumstances' even if, as Judge Metzner found, the search was for evidence of a crime"[Appellant's brief, p. 7].

The problem with the Government's position is that it has taken a rule pronounced to cover a very narrow factual circumstance* and has promoted it to purport to cover other situations, resulting, we believe, in an unreasonable and dangerous grant of carte blanche powers to the police in this area of responsibility. The potential pandora's box effect is quite dramatically demonstrated in the case at bar where Judge Metzner found in effect that the police were looking for nothing in particular and everything in general.

Suffice it to say that neither Cooper, Harris v. United States, supra nor Cady v. Dombrowski, supra lend credence to the Government's novel and dangerous proposal. If anything, the three

*In Cooper the lawfulness of the car seizure was unquestioned and the car was to be kept in police custody for an inordinate period of time. Forfeiture proceedings, the reason for the custody, entailed a loss of title to the State. The search there was held reasonable because of these factors and because the police had a legitimate right to protect themselves. In the case at bar no forfeiture of title would result from the custody, the car had yet to be impounded, only a few minutes having elapsed from the time it was brought to the Barracks and as the Judge found the search was not conducted for protective or administrative reasons.

cases under the facts at bar compel an opposite conclusion, for inasmuch as the search was inculpatory in nature no administrative or protective end was intended and, therefore, the seizure of the car in and of itself could not justify the search of its contents [See, supra pp.].

As to the claim that the search was merely the functional equivalent of an inventory of the car's contents, we need only once again embrace the finding of the Court below to which we have just alluded. That finding was buttressed on Johansen's testimony that the two officers were only directed to retrieve Baddia's clothing. Instead, they, presumably in the presence of Baddia, roamed far and wide, "stem to stern" to use an expression of the prosecutor, looking into the glove compartment and a locked trunk, not to mention the attache case, to discover the seized items. The Government's failure to call the police officers who had actually conducted the search necessarily caused the fact-finder to rely solely on Johansen's testimony and the results of the search. Under these circumstances, we submit, that the Government's attack on the propriety of Judge Metzner's findings is somewhat ludicrous. The Judge in our view could only do as he did and find that the ostensible search for clothing had deteriorated into a general inculpatory search of the entire car and an equally illegal intrusion into its contents, i.e. the attache case.

The burden of proof rested heavily on the Government to

demonstrate the reasonable nature of the search [United States v. Jeffers, 342 U.S. 48, 51 ( ); McDonald v. United States, 335 U.S. 451, 456 (1948)]; and the Government's blatant disregard of its duty in this case, we suggest, militates against judicial acceptance of the type of strained reasoning proffered on the inventory plaint.*

Equally meritless is the Government's effort to have this Court embrace the so-called inevitable discovery doctrine [see, i.e. People v. Fitzpatrick, 32 N.Y. 2d 499 (1973) cert. denied 94 S. Ct. 462 (1973); see, also 74 Col. Law Rev. 88-103], whereby, the taint of the incriminatory search is dissipated by the likely possibility that a subsequent inventory-type search would have uncovered the articles in question. Unfortunately this species of argument is blind to the policy considerations underlying the exclusionary rule in this area of police activity [see, Mapp v. Ohio, supra], considerations, we might observe to which this Court

*Relying on the Supreme Court's decision in United States v. Robinson, 414 U.S. 218 (1973), the Government in its brief, pp. 12 13, tries to show that the officers' subjective motivations as to what the search was all about was irrelevant to the issue at bar. While Robinson felt the arresting officer's subjective feelings were irrelevant on a question of the scope of a search incident to an arrest, the Supreme Court and this Court have concluded to the contrary when the issue revolved around the nature of a search not incident to an arrest [See, Cady v. Dombrowski, supra at 443; Dyke v. Taylor Implement Mfg. Co., supra at 221; United States v. Capra, supra at 280]. It is enough to cite the Court in Cady: "We believe that the Court of Appeals should have accepted, as did the state courts and the District Court, the findings with respect to Officer Weiss' specific motivations and the fact that the procedure he followed was 'standard'". 413 U.S. at 443.

has steadfastly adhered in the face of the tantalizing and beguiling appeal of the inevitable discovery formulation [See, i.e. United States v. Schipani, 414 F. 2d 1262 (2d Cir. 1969) cert. denied 397 U.S. 922 (1970); United States v. Paroutian, 299 F. 2d 486 (2d Cir. 1962)]. As this Court stated in Paroutian:

> "On the other hand, a showing that the government had sufficient independent information available so that in the normal course of events it might have discovered the questioned evidence without an illegal search cannot excuse the illegality or cure tainted matter. Such a rule would relax the protection of the right of privacy in the very cases in which by the government's own admission, there is no reason for an unlawful search. The better the government's case against an individual the freer it would be to invade his privacy. We cannot accept such a result. The test must be one of actualities, not possibilities [299 F. 2d at 489].

C. NO PROBABLE CAUSE EXISTED TO SEARCH THE CAR AND ITS CONTENTS. IF PROBABLE CAUSE EXISTED A WARRANT WAS REQUIRED UNDER THE FACTS OF THIS CASE [Answering Appellant's brief, Point II, A, B and C, pp. 16-17].*

It will be recalled that Trooper Johansen knew, well in advance of the day he had the Cadillac under surveillance, what Zaicek had done in Vermont. Specifically, he was aware Zaicek had left the application and bill of sale with Upmal (11). Through his own investigatory efforts, Johansen was also cognizant of the vehicle's owner, the lease between that owner and Zaicek, the report that the car was "overdue" and that a check had "bounced". When Zaicek was stopped in the private driveway, Johansen took possession of his licenses, the registration and the rental agreement for the Cadillac. Now it is argued that despite the documents and evidence the authorities collectively had amassed pertaining to Zaicek's possession of the car, Johansen had probable cause to believe the car contained evidence of the crime of possession of a stolen vehicle. We disagree.

All of the allegedly inculpatory evidence was already in

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*We should note at this point that the Government's brief attacks the standing of Zaicek to the suppression hearing. This issue was never raised in the briefs and arguments below, and consequently Judge Metzner did not have the question of standing before him. Be that as it may, we feel it only necessary to remind this Court of the Supreme Court's decision in Jones v. United States, 362 U.S. 257 (1960) which conferred standing automatically to anyone charged with a crime whose essential element was possession. The Jones decision is still the law of the land [see, Simmons v. United States, 390 U.S. 377, 390 (1968)] at least with respect to facts as presented herein [see, also, United States v. Cobb, 432 F. 2d 716 (4th Cir. 1970); Cotton v. United States, 371 F. 2d 385 (9th Cir. 1967); Simpson v. United States, 346 F. 2d 291 (10th Cir. 1967)].

in the collective hands of the Florida leasing company, Martin Upmal, the Vermont official, and investigator Johansen. Barring admissions, Zaicek's criminal culpability had to stand or fall on those very items [see, United States v. Jackson, 429 F. 2d 1368, 1372 (7th Cir. 1970); United States v. Faulkner, 488 F. 2d 328 (5th Cir. 1974)] for this was not a case where the vehicle was reasonably believed to be used to transport contraband [United States v. Capra, supra at 280], or one driven by gun-toting robbers [Chambers v. Maroney, supra; United States v. Ellis, 461 F. 2d 962 (2d Cir. 1972)], much less the typical stolen car situation. In point of fact Johansen would have been hard pressed to detail to an impartial magistrate the seizable articles he reasonably believed discoverable in the vehicle. In short, the search of the contents of the car was not based on probable cause and consequently the seizure of the attache case and the articles within was subject to the operation of the exclusionary rule.

Nonetheless were this Court to reject the foregoing analysis, the search should be condemned for not having been previously warranted by an impartial magistrate. It is uncontrovertible that the circumstances allegedly supporting Zaicek's arrest and the later Barrack's search were known to Johansen for many days prior to his surveillance of the rented Cadillac parked in the private driveway. Johansen did not learn anything he did not already know when he called the leasing company from Baddia's home. All of

the circumstances and facts, therefore, were "foreseeable" which was not the case in Chambers.

Moreover, Zaicek's car never left the private driveway and Zaicek was not arrested in the car but rather in Baddia's home where he had peacefully sought to resolve his problem by having Johansen telephone the rental agent [see, Coolidge v. New Hampshire, supra at pp. 460-462]. Furthermore, from the time Zaicek vacated his car, Johansen had control over its keys. Ultimately, the car was driven from the driveway to the Barracks where it was locked and secured. Thus, it seems obvious that the car here, unlike the one in Chambers but similar to the vehicle in Coolidge was not even "mobile" within the meaning of the Carroll-Chambers exception to the warrant mandate. In sum, we submit, under the facts set forth above that a warrant was constitutionally required, for as Mr. Justice Stewart declared for a majority of the Court in Coolidge:

> If we were to agree...that the police may, whenever they have probable cause, make a warrantless entry for the purpose of making an arrest, and that seizures and searches of automobiles are likewise per se reasonable given probable cause, then by the same logic any search or seizure could be carried out without a warrant, and we would simply have read the Fourth Amendment out of the Constitution [id. 403 U.S. at 480].

POINT TWO

THE MOTION FOR A REHEARING WAS PROPERLY DENIED
[Answering Appellant's brief, Point III, pp. 18-19]

We need not dwell at length responding to the particular plaint raised herein. Suffice it to say that the prosecution refused, as Judge Metzner found in his opinion (84-85), to bring forward any of the policemen who conducted the search even when requested to do so by the Judge, himself. Under no stretch of the imagination, therefore, could MacAbee's proposed testimonial evidence offered only after the suppression motion was lost be considered "newly discovered". The entire handling of the case against Zaicek left a great deal to be desired and, obviously, Judge Metzner was not about to further prejudice the rights of the accused in a case which was highlighted by the filing of an indictment almost two years after the relevant events.

Finally, it should be noted that the Government did not offer any explanation why the other officer who had accompanied MacAbee was not produced. Yet, even if MacAbee's offerings were to be scrutinized it becomes clear that if he believed the attache case to belong to Baddia, who incidentally was in his presence throughout the search, he had no right to open it and search its contents. Baddia was not suspected of nor charged with the commission of any crime. We suggest that when the Government's case against Louis Zaicek is viewed from a posture of detachment it becomes clear that Judge Metzner's relevant rulings were proper

and correct in all respects.

CONCLUSION

THE ORDER OF THE DISTRICT COURT SHOULD BE AFFIRMED.

Respectfully submitted,

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